88-1574

Supreme Court, U.S.
FILED
FEB 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

WILLIAM R. BURT,

Petitioner,

vs.

THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF IDAHO; HENRY F. McQUADE, Chief Justice; JOSEPH J. McFADDEN, CHARLES R. DONALDSON ALLAN G. SHEPARD and ROBERT E. BAKES, in their official capacities; THE IDAHO STATE BAR, a professional association; GERALD W. OLSON, THOMAS A. MITCHELL, LOUIS H. COSHO, MACK A. REDFORD, DEAN E. MILLER, JOHN M. SHARP, JOHN H. BENGSTON, THOMAS G. NELSON and ROBERT K. KULL, Commissioners, former Commissioners and Officers of the Idaho State Bar Association, individually and in their official capacities; and ROBERT E. RAYBORN, individually and as a member of the Idaho State Bar,

Respondents.

ON WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION

William R. Burt
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Petitioner Pro Se

QUESTIONS PRESENTED FOR REVIEW

1. Was it proper for Associate Justice Anthony Kennedy, while sitting as a Circuit Judge in the Ninth Circuit, to continue to participate in and to preside over a three-judge panel hearing the appeal in Burt v. Justices of the Supreme Court of the State of Idaho, et al., (same case #87-1780, October, 1987 term in Supreme Court) after he came:

(a) Under active consideration for nomination or was selected by the President to become an associate justice of the Supreme Court of the United States;

(b) knowing that he would have to seek confirmation by the United States Senate; and

(c) knowing that the Idaho State Bar was a named defendant, and

(d) knowing that he would have to seek to avoid antagonizing Idaho State Bar member, U. S. Senator James A. McClure (and senators from other states whose bars are organized in the guild pattern) in order to avoid causing opposition to be organized to his selection or confirmation (such as occurred to Judge's Bork and Ginsburg), and

(e) knowing that elevation to Associate Justice in the United States Supreme Court meant not only an increase in prestige but also an increase in salary from $95,000 to $110,000, and

(f) knowing that 28 U.S.C. 455(a) and (d)(1) prohibited his continued participation in the Burt proceedings after it should have been apparent that conflict was inherent

in determining whether the Idaho State Bar was a guild in conflict with the United States Constitution and avoiding incurring the hostility of senators such as Senator McClure if he participated in the issuance of an opinion that held the bars of their states to be unconstitutional state law guilds.

2. The bias of a single member of the three-judge panel taints irremediably the deliberations of the entire panel, and 28 U.S.C. 455(a) and (d)(1) is violated even though the decision was unanimous.

3. The motion to vacate should have been processed for consideration in the Circuit by a panel of judges who were not members of the three-judge panel that included Justice Kennedy which issued the Circuit Court order filed December 2, 1987

(Circuit Judges Kennedy and Beezer and District Judge Aguilar).

4. The Ninth Circuit Court was obligated (no certiorari discretion) to decide whether or not the Idaho State Bar as legislated or operated was or was not a guild in contravention of the United States Constitution.

(a) Because of the issue constituted an essential threshhold component of a case arising under the Constitution, and

(b) inasmuch as the issue was presented in terms of there was no valid state action, such as would exempt the Bar officials from the Sherman Act, because the Bar officials were acting on behalf of an unconstitutional guild, it was

strictly necessary that the guild constitutional issue be decided before any analysis of the applicability of the Sherman Act would become appropriate.

(c) In fact, there was no mention of the guild, as a constitutional issue or otherwise, in the Circuit Court's unsigned and unpublished memorandum that accompanied its order entered December 2, 1987.

(d) As reported in the national press, Justice Kennedy's name was on the original list of ten candidates circulated by the Administration to the Senate Judiciary Committee (Judge's Bork's and Ginsburg's names were on the list) and Justice Kennedy finally became the President's choice

during the week of November 9-16, 1987 (See "Newsweek" November 23, 1987, at page 21). He was in serious contention for the nomination beginning immediately after oral argument and submission of the Burt appeal on September 9, 1987.

(e) Burt may reasonably conclude that the avoidance of any discussion of the guild issue was in furtherance of Justice Kennedy's natural objective of obtaining nomination and confirmation of his elevation to become an associate justice of this Court.

LIST OF PARTIES

All parties are named in caption.

OPINION BELOW

The order appealed from was filed November 29, 1988 and appears in the

Appendix hereto (A-1).

GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED

Review is sought under the authority of 28 U.S.C. 1254(1) and, becuase it involves judicial discipline at the Circuit Court level, it is of imperative public importance in interpreting the U. S. Constitution and requires immediate settlement in this Court so that the public will no longer be deprived of the protection to which it is entitled from the existence of state created guilds.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Due process provision of the Fifth Amendment and 28 U.S.C. 455(a) and (d)(1) "Disqualification of justice, judge or magistrate" (Text in Appendix, A-2).

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2. United States Constitution

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3. United States Statutes

28 USC 455(a) 2, 3, 7 11, 17

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4. Text and Articles

Newsweek, 11/23/87, p. 21 6

Newsweek, 10/19/88, p. 27 8

"Battle Cry of Freedom", J.M. McPherson, Oxford Press, 1988 at p. 548 20

STATEMENT OF THE CASE

Immediately after oral argument and submission of the case to a three-judge panel of the Ninth Circuit on September 9, 1987, the subject of a replacement associate justice for the Supreme Court arose in the national press, newspapers and periodicals. The members of the three-judge panel were Circuit Judges Kennedy* and Beezer and District Judge Aguilar. Initially, the western newspapers began touting Justice Kennedy as a good candidate, but conceding that the conservative side of the Republican Party would favor Judge Bork.

"Newsweek" for the week ending October 19, 1988 (p. 27) reported that

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* Justice (then Judge) Kennedy presided over the panel and was its expert in constitutional law matters.

during the week of October 5-12, Judge Bork's confirmation appeared in trouble and he had been counted as unconfirmable by Senator Dole.

The spokesman for the Republican Conservatives in the Senate was Senator James McClure who had been prominent as a protector of the Administration during the Iran-Contra hearings. Even though Senator McClure was not a member of the Senate Judiciary Committee, he (representing conservative Republicans) became one the recognized spokesmen for the Administration during the attempt to win confirmation by Judge Bork, and the subsequent maneuvering that led from Judge Ginsburg to the confirmation of Justice Kennedy.

As an Idaho lawyer, Senator McClure was required to be a member of the Idaho

State Bar, and the Bar membership represents an important portion of his constituency. The Republican Party is strong and conservative in Idaho and bears an important share of the responsibility for the Bar's activity in the State.

Any federal judge participating in holding the Idaho Bar's structure or operations to be violative of the United States Constitution would not have been considered in a favorable light by Senator McClure and his associates. The one manner in which they would make their displeasure felt would be at a time when the lifetime appointed judge would come up for confirmation when nominated for elevation to a higher court, or to prevent his nomination.

The focus here is on Senator McClure because he is a member of the defendant

organization and his actual vote (and those of other senators from states with integrated bars that might be considered guilds) was required in the confirmation process. As ad adjunct there is the probability that the Idaho and similar bars would produce hostile testimony at any confirmation hearings, or cause the endorsement by the American Bar Association to have been withheld from Justice Kennedy if his panel had held the Idaho State Bar to be, or having acted as, a state law guild in contravention of the United States Constitution.

This Court's opinion in John A. Liljeberg Jr., Petitioner v. Health Services Acquisition Corp., 496 U.S. ____, 100 L.Ed. 2d 855 (1988) is controlling on many of the issues raised herein, and places on Justice Kennedy the duty

to know that 28 U.S.C. 455(a) and (d)(1) fixes on him the responsibility to withdraw from adjudicating the Burt appeal and to cause the consideration of and jurisdiction over the appeal to be placed in a different three-judge panel.

ARGUMENT

The rule of law is clear that the bias of a single member of the panel, taints the proceedings before the entire panel and requires readjudicating by an untainted panel. The rule stated in connection with arbitration awards is:

> "Where there are several arbitrators, misconduct on the part of one only who acts with the others is ground for setting aside the award, although it was unanimous, and although the award by the others alone would have been valid". 6 CJS "Arbitration" Sec. 153, p. 403. Same rule is stated in 5 AmJur2d "Arbitration and Award", Sec. 177, p. 650.

There is clear evidence in the "Memorandum" opinion accompanying the order filed December 2, 1987 (text is reprinted in Appendix at A-3 to A-24) (circa) of deliberate avoidance of any discussion of the "guild issue".*

Unlike this Court which operates under rules of discretionary review, the Circuit Court of Appeals for the Ninth Circuit is obligated to decide issues of constitutional interpretation that come before it. Cohens v. Virginia 6 Wheat (19 U.S.) 264, 378 and 403 [404] (1821).

This is so when the submission meets the test of "strict necessity". Rescue Army v. Municipal Court, 331 U.S. 549, 568-575 (1945).

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* Three justices of this court have already indicated that a state law guild would be unconstitutional. Hoover v. Ronwin, 466 U.S. at pp. 582-588 (1984).

Burt's submissions to the Circuit Court made it clear that the Idaho State Bar's acts were immune under the "state action" doctrine of Parker v. Brown, 317 U.S. 341 (1943) only if it was first determined that the Bar's organization or operations were not those of state law guild in contravention of the United States Constitution.

The guild issue was clearly posited before the Circuit Court in Burt's "Opening Brief" and "Reply Brief":

> (1) Is the establishment of such a guild in Idaho for the regulation of the practice of law in Idaho violative of the U.S. Constitution, particularly as such organization artificially restricts the fundamental right to move one's practice interstate (S.Ct of New Hampshire v. Piper 470 U.S. 274, 281 (1985)) and causes the denial of "due process" in the Federal courts in Idaho (5th Amendment)?
>
> (2) Does the existence of such a guild with self-regulatory powers violate Sec. 2 of the Sherman Act as creating an illegal monopoly power by state statute beyond the scope of the

powers reserved to the states under the Tenth Amendment. Northern Securities v. U.S., 193 U.S. 197, 344-5 and 350 (1904);
(Appellant's "Opening Brief", pp. 1-2)

The Idaho statutes (App A) that purport to assert the usurped power in violation of the Tenth Amendment to the U.S. Constitution are void (See 16 CJS "Constitutional Law" Sections 108-110), and thus form no basis for "state action exemption" for persons operating the Idaho State Bar. As a result, it and they are fully subject to Sections 1 and 2 of the Sherman Act. Section 2 because they possess monopoly power in the market represented by the practice of law in Idaho. It is the power, not its exercise, that is condemned by Section 2 of the Sherman Act. U.S. v. Griffith, 334 U.S. 100, 107 (1948).

As a "guild", the Idaho State Bar is violator of the U.S. Constitution and the Sherman Act. Hoover v. Ronwin 466 U.S. 558, 582-4 (1984) and Standard Oil, supra, at p. 52.

Respondents appear to concede the above analysis because nowhere in their Brief do they deal with the problem for the defense posed by Northern Securities v. U.S., supra, at 350 a decision under the Tenth Amendment. "No state can endow any of its corporations or any combination of the citizens with authority to restrain interstate ***

commerce. 5 CJS "Appeal and Error" Sec. 1344
(Appellant's "Reply Brief", p. 2)

Until the guild constitutional issue was decided, there was no use focusing on the applicability of this Court's opinion in Hoover v. Ronwin, 466 U.S. 558, 560 and 567 (1984) which was merely an opinion that the Sherman Act did not apply because of "state action" exemption. As a constitutional issue, the proper precedent was this Court's opinion in Bates v. State Bar of Arizona, 433 U.S. 350, 359 (1977), also see Goldfarb v. Virginia State Bar, 421 U.S. 773, 791 (1975).

The "guild" issue was not mentioned in the Circuit Court "Memorandum" and was passed over obliquely in the statement (A-21).

> "It is unnecessary to travel the paths and alleyways of the many arguments Burt has raised in challenging the constitutionality of the Idaho bar statutes and rules" *

Cohens, supra (19 U.S. at 403 [404]) states that it is obligatory to rule on the constitutional issue presented: "Is or is not the Idaho State Bar a law guild in contravention of the U.S. Constitution, particularly but not exclusively of the Tenth Amendment" as interpreted by Justice Harlan in Northern Securities v. U.S., 193 U.S. 197, 344-5, 350 (1904):

> "no state can endow any of its corporations or any combination of its citizens with authority to restrain interstate commerce".

In its ruling under the Tenth Amendment the Court was carrying forward

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* See "Newsweek", Nov. 23, 1987 at p. 21 stating as Justice Kennedy's philosophy "why stretch to reach a controversial social issue unless you really have to".

the "pursuit of happiness" and "blessings of liberty" provisions of the Constitution, Paul v. Virginia, 8 Wall (75 U.S.) 168, 180 (1869) and carrying out this Court's responsibility to delineate the scope of state action permitted to impact on interstate commerce License Cases 5 Haw. (46 U.S.) 504, 574 (1847).

The laws reach the actions of Circuit judges U.S. v. Manton, 107 F.2d 834 (CA 2, 1938) and it is clear that the restrictions of 28 U.S.C. 455(a) and (d)(1) reach all federal justices and judges through the appeal process (A-3).

It is not unreasonable for Burt to conclude, based on the omission of any ruling on the state law guild issue, that the Circuit Court "Memorandum" as filed December 2, 1987, was drafted with the intent of avoiding such embarrassment to Justice Kennedy as might prevent either his being nominated, or, if nominated,

prevent his confirmation to being elevated to Associate Justice in this Court. The taint carries through to Judge Beezer's and Aguilar's participation in the order appealed from herein and filed November 28, 1988. U.S. v. Martorano, 620 F.2d 912, 919 (CA 1, 1980), cert. den., 449 U.S. 952.

By letter dated March 1, 1989, the Clerk of this Court (Mrs. Ruffin) requested that the District Court opinion and orders be included in the Appendix. This has been done (A-27 and 30) but points out further appearance of subterfuge in the Circuit Court Memorandum Opinion which states:

> "The district court properly handled all summary judgment motions brought before it," (A-31).

The summary judgment order on the state law guild issue was entered March 11, 1983 (A-30), based on a motion filed by defendants on March 10, 1983 (A-32).

The motion purports to incorporate a memorandum submitted by the Idaho justices on the issue of whether or not the Idaho State Bar was organized or operated as a state law guild. No such memorandum was ever submitted by the defendant Justices and, hence, is not a part of the record on appeal. The documents that are in the record, but not the one on appeal, consist of concurrence by the defendant Justices in a memorandum submitted by the Idaho State Bar. The Bar document neither mentions, discusses, nor refutes Plaintiff's presentation on the "state law guild issue" (documents were #165 and #166). As a result, it is not unreasonable for Burt to conclude that the public has been wrongfully deprived by the Circuit Court (bias resulting from Justice Kennedy seeking confirmation as Associate Justice while opinion was under

preparation) and the District Court (his son prepared the challenged August, 1972 examination) of a determination under the Constitution as to whether or not the Idaho State Bar is or has operated as a state law guild in violation of the U. S. Constitution. Cohens v. Virginia, 6 Wheat (19 U.S.) 264, 378 and 403 [404] (1821). The Constitution requires that the Supreme Court correct the omissions.

The order entered December 2, 1987 in the Burt proceeding should be vacated and the Ninth Circuit directed to analyze and rule on the state law guild issue.

What the British had in the "Inns of Court" and the British law guild system was known to the drafters of the U.S. Constitution and was an example of what they wished to avoid having in the new nation. America has been rewarded when it stood for "a general recognition of the

right of mankind to the produce of their labor and the pursuit of happiness" (See "Battle Cry of Freedom", J.M. McPherson, Oxford Press, 1988 at p. 549). There is no reason beneficial to the future happiness and prosperity of this nation, why the Article III courts should shelter the Idaho Bar from the requirement to confirm to constitutional standards. This is a bar that on one occasion passed no applicants for admission, on another passed only 44%, and never has permitted a single older lawyer applicant from another state to be admitted to the practice of law in Idaho by the examination process. (discussed Petition for Certiorari*, pp. 13-14). What possible benefit to the nation can stem from such restrictive practices? Surely Justice Scalia intends that the decisions be bona fide decisions in the public interest by states, and not by guilds possessing usurped powers, as to what rules are adopted for admission to

* in 87 - 1780

practice law in the states. Supreme Court of Virginia v. Friedman, 56 LW 4669, 4672 (decided June 20, 1988).

RELIEF REQUESTED

1) That this Court will grant certiorari, and

2) Additionally, reverse the Circuit Court order (App. 1) of November 29, 1988, and direct that the Circuit Courts Order of December 2, 1987 (referred to in App. 1) be vacated and that the appeal leading to the December 2, 1987 order be reheard by a three-judge panel free of any appearance of bias.

DATED this 21 day of March, 1989.

Respectfully submitted

W. R. Burt

William R. Burt
Petitioner Pro Se

PROOF OF SERVICE

I, William R. Burt, a member of the Bar of the United States Supreme Court, representing the Petitioner on whose behalf service of the foregoing document has been made, hereby certify that all parties required to be served have been served in compliance with Supreme Court Rule 28.3, by depositing a copy of the foregoing document in a United States Post Office, First Class, postage prepaid, addressed to counsel of record, at his post office address for each party listed as follows:

CLEMONS, COSHO & HUMPHREY
815 West Washington Street
Boise Idaho 83702

ELAM, BURKE & BOYD
P. O. Box 1559
Boise Idaho 83701

on this 21 day of March, 1989.

William R. Burt
Petitioner Pro Se

Filed 11/29/88
Catherine A. Catterson
Clerk, U.S. Court of
Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM R. BURT,	)	CA NO. 83-3878
	)	
Plaintiff-Appellant	)	DC NO.
	)	CV-76-22 RM
v.	)	
	)	ORDER
THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF IDAHO, et al	)	
	)	
Defendants-Appellants	)	
	)	

Before: BEEZER and NOONAN, Circuit Judges and AGUILAR.*

Appellant's "Motion to Vacate Opinion and Order filed December 2, 1987" is denied.

*The Honorable Robert P. Aguilar, United States District Judge for the Northern District of California, sitting by designation.

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. 455

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceedings in which his impartiality might reasonably be questioned.

* * *

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM R. BURT, Plaintiff-Appellant	)	No. 83-3878
v.	)	D.C. No. 76-22
THE HONORABLE JUSTICES OF THE SUPREME COURT IDAHO, et al., Defendants-Appellees	)	

APPEAL from the United States District Court for the District of Idaho (Boise).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court; Court for the _____ District of Idaho (Boise) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered Dec. 2, 1987

NOT FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM R. BURT, Plaintiff-Appellant, v. THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF IDAHO, et al., Defendants-Appellees	)	Case No. 83-3878 D.C. # 76-22 MEMORANDUM

Appeal from the United States District Court for the District of Idaho
Ray McNichols, District Judge, Presiding
Argued and submitted on September 8, 1987
Seattle, Washington

Before: KENNEDY and BEEZER, Circuit Judges, and AGUILAR,* District Judge.

*Honorable Robert P. Aguilar, United States District Judge for the Northern District of California, sitting by designation.

I. INTRODUCTION:

Appellant William Burt seeks damages as well as declaratory injunctive relief against the Justices of the supreme Court of Idaho (the "Justices"), th Idaho State Bar Association (the "Bar"), the Board of Commissioners of the Bar, (the "Board"), the individuals who were commissioners and officers of the Bar during the period of injury, and Robert Rayborn, a lawyer who represented Burt in a court proceedings over a decade ago. The district court denied any relief. Appellant now challenges the procedural and substantive handling of the case below. We affirm the district court in all respects.

II. FACTS:

(A) Overview:

William Burt is licensed to practice law in the State of New York. In 1982, after maintaining a residence in Idaho for

some time, Burt took and failed the Idaho bar examination. After he took and failed the exam again in 1975, he initiated this lawsuit. In count one of his Amended Complaint, Burt alleges that the statute authorizing the bar admission process is unconstitutional on its face and as applied to him. In count two, Burt complaints of the treatment he received in two lawsuits which were resolved in 1972. Essentially, Burt contents that he was denied access to the courts and was the victim of "malicious and vindictive" treatment by the Justices and the Bar. In count three, Burt alleges that all of the defendants participated in a conspiracy to stifle competition in the provision of legal services in Idaho.

(B) The Proceedings and Disposition Below:

The original complaint was filed on January 30, 1976, and contained three counts. On March 21, 1978, the district court dismissed the entire complaint for lack of subject matter jurisdiction and on sovereign immunity grounds. On appeal in October, 1980, a panel of this circuit affirmed dismissal as to count two (malicious treatment, denial of due process and access to courts), but reversed and remanded as to count one (constitutional issues0 and count three (antitrust). The present Amended Complaint was filed in March, 1982. Ignoring the ruling of the circuit, Burt's amended complaint included, verbatim, count two of the original complaint. Burt also added a count four, complaining vaguely about denial of access to judicial review in two cases concluded in Idaho in 1972.

On July 2, 1982, the district court judge granted a motion to dismiss counts two and four of the Amended Complaint. At the same hearing, the court also denied certification of a class with respect to count three (antitrust claims).

At a hearing on January 31, 1983, the court granted summary judgment against part of count three and dismissed appellees Justices as to all of count three. In the order of February 7, 1983, formalizing the ruling, the court separated count three into two components. Those claims alleging a conspiracy to restrain trade by use of the bar examination (preparation, administration, and grading) and rules and regulations regarding admission to practice were dubbed "admissions" claims. Those claims involving the use of a minimum fee schedule issued and enforced

by the Bar between the years 1953 and 1973 were called "fee schedule" claims. The Court granted summary judgment as to the admission claims but not as to the fee schedule claims, except with respect to the Justices who were dismissed entirely from count three.

On March 11, 1983, the court denied appellant leave to amend his complaint. The court also denied appellant's motion for summary judgment on count one and the remainder of count three and ordered briefing for purposes of deciding count one of the basis of stipulated facts.

On March 14, 1983, the parties submitted count one (1983 and 1988 claims of constitutional rights violations) to the judge to decide based on stipulated facts and deposition transcripts. In light of the evidence presented, the court found that no

constitutional rights had been violated, nor any privileges and immunities infringed. Accordingly, judgment was entered in favor of appellees.

By the date of March 14, 1983, the only remaining component of appellant's Amended Complaint was that part of count three described as the fee schedule claims. A jury was impaneled and heard evidence. At the close of appellant's case, the court directed a verdict in favor of appellees. Final judgment was entered on April 8, 1983.

On May 9, 1983, a motion for a new trial was denied. Appellant now appeals the entry of judgment and all of the orders entered by the district court in the case below.

III. DISCUSSION:

(A) DISMISSAL OF COUNTS TWO AND FOUR:

Count Two of the Amended Complaint is a hybrid claim challenging the constitutionality of the bar exam on due process grounds and attacking actions of the Bar and Justices in relation to an earlier lawsuit filed by Burt. These claims were raised and dismissed once before. The first dismissal was affirmed on appeal and we renew that affirmance.

To the extent that the allegations in count four repeat claims made in count two, there were properly dismissed for the reasons that count two was properly dismissed. The only element of count four not contained in count two is an incident involving the Bar's refusal immediately to investigate Burt's complaint against his lawyer filed in 1972. On its face, this allegation is meritless and was properly dismissed for failure to state a claim. See Federal Rule of Civil Procedure

12(b)(6). Hence, the district court properly dismissed the claim.

(B) DENIAL OF CLASS CERTIFICATION AS TO THE COUNT THREE FEE SCHEDULE CLAIMS:

Class certification on the third claim alleging antitrust violations was denied because appellant's proof of numerousity was too speculative and his situation was too unique to make him the representative of the class sought to be certified. On appeal, the standard of review for this ruling denying class certification is abuse of discretion. See Siles v. ILGWU Nat'l Retirement Fund, 783 F.2d 923, 926 (9th Cir. 1986); Wrighten v. Metropolitan Hospitals, 726 F.2d 1346 (9th Cir. 1984).

Burt's lawsuit contains far-reaching claims which extend beyond the ordinary. He alleges that malicious and unconstitutional acts were directed

specifically against him by the Bar and Justices of the State of Idaho. By his own description, he stands in an extraordinary position vis-a-vis the legal establishment in Idaho, a position that makes him decidedly atypical. Furthermore, the relief he seeks is both more elaborate and systematic than would be sought by the typical fee-schedule plaintiff. Consequently, the district court did not abuse its discretion in refusing to certify Burt to lead a plaintiff class in litigating the fee schedule antitrust claims.

(C) SUMMARY JUDGMENT AS TO COUNT THREE "ADMISSIONS CLAIMS":

(i) Standard of Review:

As described above, the district court divided count three into two components. On January 31, 1983, and in an order that followed on February 7, 1983, the district court granted a summary

judgment in favor of defendants with respect to the admissions claims. The granting of a motion for summary judgment is reviewed on a de novo basis. See Lucas v. Bechtel Corp, 800 F.2d 839, 843 (9th Cir. 1986) (discussing this standard in context of an antitrust suit); Golden v. Faust, 766 F.2d 1339, 1340 (9th Cir. 1985).

The "State action" exemption refers to the fact that the Sherman Act was not intended to apply to actions of the States. In Parker v. Brown, 317 U.S. 341 (1943), the Supreme Court held that an anticompetitive marketing program which "derived its authority and its efficacy from the legislative command of the state" did not violate the Sherman Act. Id. at 350. The explanation for this exception is that the Sherman Act "was intended to regulate private practices and not to

prohibit a State from imposing a restraint as an act of government." Goldfarb v. Virginia State Bar, 421 U.S. 773, 788 (1975), citing Parker, 317 U.S. at 350-52, and Olsen v. Smith, 195 U.S. 332, 344-45 (1904).

The court has developed a two-pronged standard for assessing the availability of the state action exemption to antitrust liability. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy". California Retail Liquor Dealers Ass'n v. Midcal Alum., 455 U.S. 97, 105 (1980), quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978) (opinion of Brennan, J.). Second, the policy must be "actively supervised" by the State itself. Id. In a variety of circumstances, the Court has applied these criteria either to immunize

state action from antitrust liability, see, e.g., Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (involving Arizona Supreme Court's complicity in ban on advertising of legal services); Hoover v. Ronwin, 466 U.S. 558 (1984) (involving the Arizona Supreme Court's administration of the state bar examination), or to deny the invocation of the state action exemption. See, e.g., Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982) (municipal regulation of cable television industry); California Retail Liquor Dealers Ass'n, 455 U.S. 97 (1980) (private price-fixing scheme authorized by state statute); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (minimum fee schedule enforced by integrated state bar).

(ii) Analysis of the State Action Exemption:

The task of deciding whether the district court was correct in ruling that the state action exemption applies in this case is rendered facile by the Supreme Court's decision in Hoover v. Ronwin, 466 U.S. 558 (1984). Although it was a plurality opinion (4-3 with two abstentions), Ronwin is controlling in this instance. Burt has mounted essentially the same challenge to the Idaho bar regime that Ronwin unsuccessfully mounted against the bar examination scheme in Arizona.

Comparing the laws of Arizona with those of Idaho, one finds that the standards for the regulation of admission to the legal profession are very similar. The Supreme Court of Idaho is invested by statute with complete and final authority to control admission to the state's integrated bar. The one difference form

Arizona is that rather than allowing the high court to select a bar committee, the Idaho statute provides for election of the Board of Commissioners by all members of the state bar. Notwithstanding election independent of the Idaho Supreme Court, the Board's authority is subordinate to the supreme court at every juncture. Section 3-408 of the Idaho Code explicitly provides the following:

> The [Board] shall have the power to determine, by rules, subject to the approval of the Supreme Court, the qualifications and requirements for admission to the practice of the law and to conduct investigation and examination of applicants, and it shall from time to time certify to the Supreme Court the names of those applicants found to be qualified. The approval by the Supreme Court of the applicants whose names are so certified, shall entitle them to enrollment, as members of the bar of this state, and to practice law upon paying the required fees and taking the oath. (emphasis added)

Thus, the Supreme Court of Arizona in Ronwin, the Supreme Court of Idaho retains complete authority to regulate who is admitted to practice law in the State of Idaho. If the question is indeed "who denied [Burt] admission to the [Idaho] Bar?," Ronwin, 466 U.S. at 581, then it is clear in this case that the answer is the Idaho Supreme Court. Any doubt is completely removed by the fact that by law Burt was permitted to and did pursue direct appeal to the Idaho Supreme Court. In Docket 11174, Burt raised his grievances directly with the Justices. The Justices refused to admit him over the advice of the Board and denied his petition. This final and direct appeal procedure to the high court in Idaho is identical to the Arizona procedure in Ronwin. The Court in Ronwin found this

compelling evidence of the existence of state action.

Beyond the contents of the statute and rules, the grapple with the gist of Burt's admission allegations would be "to look behind the actions" of the Justices and, in the opinion of the plurality in Ronwin, would "emasculate" the state action doctrine articulated in Parker v. Brown. Unless the district court here was willing to assume that the Justices "failed to comply with state law, and allowed the [Board] alone to make the decisions" regarding the August 1972 bar examination, application of the state action exemption was appropriate. 466 U.S. at 582. In view of the Ronwin plurality's conclusion that courts must assume that a state supreme court does its job, summary judgment was properly granted

against Burt in his admissions antitrust claim in count three.

(D) ENTRY OF JUDGMENT AGAINST BURT ON COUNT ONE:

Count one contains Burt's assault on the constitutionality of Idaho's bar admission statute. The crux of this count is found in the following passage from the Amended Complaint:

> No concern or consideration was given by the Idaho State Bar as to the age, experience and special expertise of the Plaintiff in the construction, contents and duration of the Bar examinations he was required to take and pass in August, 1972 (then age 58) and February, 1975 (then age 60).

Amended Complaint at 9, lines 14-19.

The parties submitted to the district court a statement of stipulated facts vis-a-vis count one. That statement reported that every applicant, including those admitted to practice law before courts in other states, must take and pass the Idaho bar examination. Under certain

conditions, an out-of-state attorney is permitted a waiver with respect to the multi-state portion of the Idaho bar examination, but other than that concession to out-of-state attorneys, all applicants approach the examination on a level playing field. Age, experience, training, or position are not considered by the Board in preparing, administering or evaluating the examination. Burt contends that this is unconstitutional both in principle and in application to himself, and he offers five or six lines of attack on the constitutionality of the bar admission statute. The standard of review for legal conclusions is de novo. The standard of review for findings of fact, even though drawn from a written record, is whether the finding was clearly erroneous. Burlington Northern v.

Weyerhaeuser Co., 719 F.2d 304, 307 (9th Cir. 1983).

It is unnecessary to travel the paths and alleyways of the many arguments Burt has raised in challenging the constitutionality of the Idaho bar statute and rules. The state and rules did not violate Burt's right to travel, nor did they violate the Full Faith and Credit, Privileges and Immunities, Commerce, Due Process, or Equal Protection Clauses of the Constitution.

In a nutshell, Burt's constitutional assault upon the Idaho bar admissions scheme amounts to a demand for special treatment. The various theories he offers challenging the statute and rules have been argued, considered, and rejected on several occasions by federal courts in this country. The administration is bound to give some applicants an advantage over

other applicants. Deep thinkers and slow writers inevitably will be disadvantaged as against the glib and the nimble. Those who have faced the dragon in one state may have to face it again in another state before being admitted to practice there. One state may set higher standards than another state or administer a more rigorous examination. The principles that Burt invokes, drawn from both the Constitution and the concept of federalism, simply do not demand homogeneity or perfect equality among all the states vis-a-vis admission to practice law. The result, as yielded in this case, is sometimes unpleasant but is not unconstitutional.

(E) REMAINDER OF THE CASE:

Burt raises a host of other substantive and evidentiary challenges to the district court's judgment. None of

these challenges has merit. The district court's handling of the evidence and its ruling in granting a motion for a directed verdict as to Burt's fee schedule claims were proper in all respects. Furthermore, the district court did not abuse this discretion in refusing to recuse himself. Burt is not entitled to attorneys fees. The district court properly handled all summary judgment motions brought before it, and justifiably refused leave to amend the complaint.

IV. CONCLUSION:

The judgment of the district court is affirmed in all respects.

IT IS SO ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

WILLIAM R. BURT, Plaintiff,	)	Civil No. 1-76-22
vs.	)	
THE HONORABLE JUSTICES OF THE SUPREME COURT IDAHO, et al., Defendants.	)	JUDGMENT

This action was before the court on two Causes of Actions stated in the Plaintiff's Amended Complaint, to wit: Cause One and Cause Three.

As to Cause One the parties submitted the matter to the court on a stipulation for a factual and legal determination by the court. The court fully considered the matter and made Findings of Fact and Conclusions of Law thereon determining that the defendants were entitled to judgment as a matter of law.

The Third Cause of Action initially consisted of two claims. In the first, plaintiff alleges violations in connection with his status as a prospective competitor of Idaho attorneys. Plaintiff brought the second claim as a consumer of legal services. As to the first claim the court entered partial summary judgment for the defendants on the ground that the claim was barred by the State action exemption to this Antitrust Laws. The second claim came on for trial before a jury, but at the conclusion of plaintiff's case, the court directed a verdict against the plaintiff and subsequently entered an order to that affect.

The foregoing completes all of the presently viable claims made by the plaintiff and final judgment is hereby entered:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Judgment is hereby entered in favor of the defendants, and each of them, against the plaintiff, on the First Cause of Action of Plaintiff's Amended Complaint, and the plaintiff shall take nothing thereby.

2. Judgment is hereby entered in favor of the defendants, and each of them, against the plaintiff, on the Third Cause of Action of Plaintiff's Amended Complaint, and the plaintiff shall take nothing thereby.

3. The defendants are granted their costs in the sum of $_____.

/s/ Ray McNichols
RAY McNICHOLS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

WILLIAM R. BURT,	)	
	)	
Plaintiff,	)	Civil No. 1-76-22
	)	
vs.	)	
	)	
THE HONORABLE JUSTICES OF THE SUPREME COURT IDAHO, et al.,	)	ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND SUMMARY JUDGMENT
	)	
Defendants.	)	
	)	

The defendants having filed their motion for summary judgment on the question of whether the statutes creating the Idaho state integrated bar are unconstitutional; the court having considered all of the files in this case relating to this issue and having heard the arguments of counsel; there appearing to be no genuine issue of material fact, and it appearing that the defendants are entitled to judgment on this issue as a matter of law; and the court being fully advised in the premises, now, therefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

Summary judgment is granted to the defendants, since the court is of the opinion that the statutes creating the Idaho state integrated bar are constitutional as a matter of law.

Dated: 3/11/88

/s/ Ray McNichols
RAY McNICHOLS

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

WILLIAM R. BURT, Plaintiff,	)	Civil No. 1-76-22
vs.	)	
THE HONORABLE JUSTICES OF THE SUPREME COURT IDAHO, et al., Defendants.	)	JOINT MOTION FOR SUMMARY JUDGMENT

The defendants, The Honorable Justices of the Supreme Court of Idaho, the Commissioners of the Idaho State Bar, Ronald Kull and R.E. Rayborn, move this

Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for a summary judgment in the defendants' favor on the issue which plaintiff claims he has presented in the first cause of action of his amended complaint that the statutes creating the Idaho state integrated bar are unconstitutional. The defendant seek this summary judgment on the grounds that there is no genuine issue of material fact and said defendants are entitled to judgment as a matter of law, since the statutes creating the Idaho state integrated bar are constitutional.

The defendants make this motion based upon the records, files and pleadings on file with the Court in this action, including the defendants Idaho Supreme Court's memorandum in opposition to plaintiff's motion for summary judgment on

this same issue which the Supreme Court filed on 1983.

Dated this 10th day of March, 1983.

CLEMONS, COSHO & HUMPHREY

BY /s/ Christopher Burke
CHRISTOPHER BURKE, Of the Firm Attorneys for Defendant Supreme Court Justices

ELAM, BURKE, EVANS, BOYD & KOONTZ

BY /s/ William G. Dryden
WILLIAM G. DRYDEN, Of The Attorneys for Defendants Idaho State Bar, Ronald Kull and R.E. Rayborn